IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

SUPPLEMENTAL MEMORANDUM TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Pursuant to Section 24(5)[1] of the Rules of this Court, Fred W. Burdette, Sr. hereby supplements his Petition for Rehearing of Order Denying Petition for Writ of Certiorari filed in this proceeding on April 13, 1970.

The purpose of this supplemental memorandum is to call the Court's attention to a Note in the April 1970 Harvard Law Review titled *The Unconstitutionality of Plea Bargain-*

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[1] If this rule is construed by the Court to not apply to Petitions for Rehearing, Petitioner respectfully requests leave of the Court to file this Supplemental Memorandum.

ing, 83 Harv. L. Rev. 1387. This Note was not available to counsel until April 21, 1970 when the regular subscription copy of the Harvard Law Review was delivered by mail.

The instant case involves a situation where a father (petitioner) and son were jointly indicted for assault with intent to have carnal knowledge and with assault with intent to commit murder.[2] Conviction on each of these charges is punishable under Tennessee law by a sentence of not less than 10 nor more than 21 years in the penitentiary. As the result of a bargain agreed to by petitioner, his son, and the prosecution, petitioner pled guilty to assault with intent to commit a felony[3] and received an agreed upon sentence of 11 months and 29 days in jail, and his son pled guilty to assault with intent to commit murder and received the agreed upon minimum sentence of ten years in the penitentiary. (See Petition, pp. 3-4, R.4, 27-28, 36).

In the Petition for Rehearing, petitioner attempted to demonstrate that recent decisions of this Court determining the procedures to be followed in order to guarantee the Constitutional rights of defendants who enter pleas of guilty to criminal charges,[4] have left open the questions surrounding guilty pleas entered pursuant to a bargain with the prosecution, and thus have stimulated discussion of these questions in lower courts and by the American Bar Association's Project on Standards for Criminal Justice.[5] The ABA project has specifically approved the practice of plea bargaining and has set up standards to govern the acceptance of pleas entered pursuant to a bargain.[6]

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[2]Tennessee Code Annotated Sections 39-605 and 39-604.

[3]Tennessee Code Annotated, Section 39-603.

[4]*McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

[5]See *Standards Relating to Pleas of Guilty* (adopted, as amended, 2 Crim.L.Rep. 2422 1968) and *Standards Relating to the Prosecution Function and the Defense Function* (tentative draft 1970).

[6]*Pleas of Guilty, supra* at pp. 10, 60; *The Defense Function, supra* at p. 243.

In the law review Note cited above the author criticizes the conclusions of the ABA's project and, citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein*, 385 U.S. 511 (1967) argues hat:

> plea bargaining should be held unconstitutional because it places the accused in the dilemma of having to forfeit either his privilege against self-incrimination (by acknowledging his guilt through a plea of guilty) or his chance for a shorter sentence or reduced charge. Only if the state is willing to forgo the criminal prosecution can it require the individual to speak or suffer a penalty. But since the very purpose of plea bargaining is to prosecute and convict the defendant by pressuring him to plead guilty, the practice will always violate the fifth amendment. The additional penalty imposed by plea bargaining on the exercise of sixth amendment rights makes the case against the practice even stronger. (83 Harv. L. Rev. at 1400)

In the instant case, the record indicates that the coercive nature of the bargain offered petitioner was even greater than the usual situation criticized in the Note. Thus, petitioner was faced not only with the choice of either waving the several constitutional rights[7] involved in his own trial or losing his chance for significantly shorter sentence, but, in addition, if he had not waived his trial rights, he would have been unable to secure a minimum sentence for his son. (See Petition, p. 9, Arg. 11-12) For this reason, this case presents the Court with an excellent opportunity to examine and decide constitutional questions of grave importance to the administration of criminal justice in all of the courts of this country.

In light of the arguments set forth above and in the Petition for Rehearing of Order Denying Petition for Writ of Certiorari, this Court is respectfully requested

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[7] *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

to issue a writ of certiorari to the Supreme Court of Tennessee.

Respectfully submitted,

Lawrence J. Bernard, Jr.

PIERSON, BALL & DOWD
1000 Ring Building
Washington, D.C. 20036

Counsel for Petitioner

April 23, 1970

